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No. 88-1893

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GAIL MARIE KING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF PETITIONER GAIL MARIE KING

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In the petition, we established: (1) that the indictment in this case failed to allege a cognizable crime under the mail fraud statute as interpreted by this Court in *McNally* v. *United States*, 483 U.S. 350 (1987), because it alleged a deprivation of *intangible* rights only, and (2) that the decision below created a conflict in the circuits on the proper interpretation of the Fifth Amendment right to a grand jury by affirming the conviction based on a trial theory never contemplated by the grand jury in returning the indictment. In its opposition, the government relies upon only one substantive argument: that petitioner was not deprived of her right to a grand jury because the indictment in this case, read broadly enough, properly charges a deprivation of *tangible* rights,

as required by this Court in *McNally*, 483 U.S. 350. Br. in Opp. 5-7. However, as set forth below (and in the petition), the United States' argument in support of the Fourth Circuit's decision directly conflicts with decisions squarely on point in the First and Eleventh Circuits and, accordingly, this Court should grant certiorari to resolve the conflict.

1. The government's argument that petitioner was tried on the same theory relied upon by the grand jury is patently incorrect for several reasons. First, there can be no doubt that the plain language of the indictment, read fairly and completely, clearly establishes that the grand jury returned the indictment on the theory that the citizens of North Carolina had been deprived of their expectations of properly educated individuals.[1] Second, the indictment in this case was returned shortly *before* this Court's decision in *McNally*—at a time when the mail fraud statute regularly was used to protect intangible rights. Thus, there is no reason to doubt that this indictment, which charges a classic "intangible rights" scheme, was drafted *solely* to allege injury to intangible rights. Finally, the government in its opposition does not dispute the argument in our petition that the only reason the government did not reindict after *McNally* was because of a statute of limitations problem and not because the grand jury had considered any property interests in handing down its indictment. Clearly, in light of these circumstances, this Court should reject the government's strained interpretation of the indictment.

2. Because the indictment fails to allege a deprivation of money or property, the Fourth Circuit necessarily re-

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[1] While there are occasional references to "money" and "tuition" in a few isolated places in the indictment, the scheme-or-artifice section—which describes the "fraud"—speaks *only* of injury to intangible expectations. Thus, the government's continued adherence to this argument is nothing more than a wishful reading of the indictment.

lied upon the government's claim that the evidence at trial and the jury instructions clearly established deprivation of tangible rights.[2] However, as pointed out in the petition, it is constitutionally impermissible for a court to consider whether the evidence and jury instructions charged a cognizable crime, where, as here, that evidence and instruction is at odds with the theory of the case relied upon by the grand jury which handed down the indictment.[3] Pet. 7-12. Indeed, any other result—*i.e.*, a result which allowed indictment and conviction on different theories of an offense—would render the right to grand jury indictment meaningless. See Pet. 10-11.

3. Finally, the government concludes that certiorari should be denied because this issue does not warrant review in light of Congress' recent amendment of the mail fraud statute in response to *McNally*. But, contrary to the government's assertion, this case is not based on a *McNally* issue; rather, this petition raises a fundamental issue concerning the proper interpretation of the Fifth Amendment right to a grand jury. In rendering its decision in this case, the Fourth Circuit placed itself in direct conflict with the sound analysis of the First and Eleventh Circuits with respect to the proper leeway to accord to a flawed indictment. Here, the court of appeals ignored the plain meaning of the indictment. By contrast, other circuits have relied upon the plain mean-

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[2] Indeed, in its opposition, the government again relies on the fact that the evidence at trial established that certain individuals had, in fact, been deprived of money and/or property, thereby suggesting that such evidence "cured" any deficiency in the indictment. Br. in Opp. 6 n.4. This is plainly wrong.

[3] The government's reliance on this Court's decision in *United States* v. *Miller*, 471 U.S. 130, 136 (1985), is misplaced. As stated in the government opposition itself (Opp. at 6-7), *Miller* applies only when "the elements of the offense that sustain the conviction are *fully* and *clearly* set out in the indictment . . ." (emphasis supplied). This requirement was not met here.

ing as a necessary means of ensuring the right to a grand jury. It is that conflict which warrants review by this Court.

CONCLUSION

For the foregoing reasons and those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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